CASE No. 1492.

IN THE

United States Circuit Court of Appeals,

NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO., ET AL.,
Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,
Complainant and Appellee.

DEFENDANTS' BRIEF.

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vs.
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DEFENDANTS' BRIEF.

This is an appeal from a decree of the United States Circuit Court of Los Angeles, in a suit brought to cancel a patent issued by the United States unto the defendant Southern Pacific Railroad Company, for lands within the indemnity limits, and selected under the indemnity provisions, of the Railroad Company's (so-called) "Branch-Line" grant.

The patent complained of is for two separate tracts: one within primary limits, the other within indemnity limits, of the forfeited Atlantic & Pacific grant; and, as before said, both tracts are within indemnity limits of the Southern Pacific "Branch-Line" grant.

The principal purpose of the suit is to test the Southern Pacific Railroad Company's right to select, under

indemnity provisions of its "Branch-Line" grant, lands within that part of its "Branch-Line" indemnity grant which is overlapped by the forfeited Atlantic & Pacific grant.

The decision on this appeal depends on the true answer to the question: *Is the Southern Pacific Railroad Company entitled to select, under the indemnity provisions of its "Branch-Line" grant, public land found restored to the public domain at the time of selection, but which at some former time was covered by the (forfeited) Atlantic & Pacific grant?*

STATEMENT OF THE CASE.

Section 3 of the Act of Congress of July 27, 1866, (**14 Stat. 292**), made a grant of lands unto the Atlantic & Pacific Railroad Company, to aid in the construction of a contemplated railroad from Springfield, Missouri, to the Pacific Ocean. The Atlantic & Pacific Railroad Company filed in the Department of Interior maps which were accepted as definitely locating the whole line of its contemplated railroad, but did not construct any part of the section thereof located in the State of California; and on July 6, 1886, an Act of Congress was passed (**24 Stat. 123**) forfeiting and restoring to the public domain all lands granted to that Company in the State of California. *(Tr. 75, Items 7 and 8.)*

Section 23 of the Act of Congress of March 3, 1871 (**16 Stat. 573**), made unto the Southern Pacific Railroad Company a grant of lands to aid in the construc-

tion of a railroad from Yuma via Los Angeles to Mojave; which grant has been fully earned, by construction and acceptance of the railroad. This grant is known as the "Branch-Line" grant. *(Tr. 89, Items 33 and 34.)*

One tract of land in suit is within primary, the other within indemnity, limits of the forfeited Atlantic & Pacific grant; and both tracts are within indemnity limits of the Southern Pacific "Branch-Line" grant. *(Tr. 92, Items 35 and 36.)*

The patent sought to be canceled was issued on June 30, 1903, pursuant to the Southern Pacific Railroad Company's Branch-Line indemnity selection thereof made on November 10, 1902 *(Tr. 93, Item 37);* which selection, it will be observed, was made six years after the Atlantic & Pacific forfeiture Act restored the selected land to the public domain.

It is stipulated that the selection was made in due form *(Tr. 93, Item 37);* and it may be fairly stated as agreed that the selection was lawful and valid unless barred by the fact that, prior to the forfeiture Act of 1886, the land was within limits of the Atlantic & Pacific grant.

On behalf of the United States it is claimed that (1) on principle, the Southern Pacific is not entitled to select, under indemnity provisions of its Branch-Line grant, any lands of the forfeited Atlantic & Pacific grant; and that (2) it has been so finally decided in suits similar to this, between the same parties, reported in 146 U. S. 570, 146 U. S. 615, 168 U. S. 1, and 183 U. S. 519.

Our contentions, on behalf of the defendants, are, that

I. The defendant Railroad Company's right to select the lands in suit *depended on the status thereof, as public lands, at date of selection,* irrespective of their status at some former time; hence, the lands in suit being public lands at the time of selection, the selection under consideration was lawfully made.

II. It has not been held in any of the decisions introduced or relied on in behalf of the United States, that the defendant Railroad Company is not entitled to select as indemnity, lands within limits of the forfeited Atlantic & Pacific grant.

ARGUMENT.

I.

THE RAILROAD COMPANY'S RIGHT TO SELECT THE LANDS IN SUIT DEPENDED ON THE STATUS THEREOF, AS PUBLIC LANDS, AT DATE OF SELECTION, IRRESPECTIVE OF THEIR STATUS AT SOME FORMER TIME; HENCE, THE LANDS BEING PUBLIC LANDS AT THE TIME OF SELECTION, THE SELECTION UNDER CONSIDERATION WAS LAWFULLY MADE.

(a). The case of **Ryan vs. C. P. R. R. Co., 99 U. S. 382,** is on all fours with the case at bar. The land in controversy, in the Ryan case, was within the indemnity limits of the grant made by the Act of Congress of July 25, 1866 (14 Stat. 239), to aid in construction of the California & Oregon railroad, from a point on the Central Pacific railroad, about twenty miles north of Sacramento, to the north boundary line of California. At the date of grant, and date of definite location of the contemplated railroad, the land in suit was within the claimed limits of a Mexican Grant—hence was not pub-

lic land at either of those dates; but thereafter, and prior to indemnity selection by the Railroad Company, the Mexican Grant claim was finally adjudged invalid, and the lands covered by it were restored to the public domain. About a year after the final decree adjudging the Mexican Grant claim invalid, the Railroad Company made indemnity selection of the land; and the decision of the case turned on the right of the Railroad Company to make such indemnity selection. The Supreme Court held that, notwithstanding the rights of the Railroad Company attached to lands within primary limits of its grant, if at all, at date of definite location (hence the Railroad Company's right to primary limits lands of its grant depended on the status thereof as public land at date of the granting Act and definite location), the Railroad Company's right to select lands within the indemnity limits of its grant depended on the status thereof, as public land, at the date of selection.

The Supreme Court, in the Ryan case, very clearly distinguished it from Newhall vs. Sanger (92 U. S. 761), where primary lands of the Railroad Company were within claimed limits of a similar Mexican Grant at the date of railroad grant and definite location; which Mexican Grant claim, although finally adjudged invalid soon after railroad definite location, was held to prevent the passage of title under the Railroad Grant, to primary, or granted, lands thereof. At page 388 of its decision in the Ryan case, the Supreme Court said:

> "It was within the secondary, or indemnity territory where that deficiency was to be supplied. The

> Railroad Company had not, and could not have, any claim to it until specially selected, as it was, for that purpose. It was taken to help satisfy the grant to the extent that the odd-sections originally given failed to meet its requirements. *When so selected there was no Mexican Grant or other claim impending over it. It had ceased to be sub judice, and was no longer in litigation. It was as much 'public land' as any other part of the national domain.* The patent gave the same title to the appellee that a like patent for any other public land would have given to any other party. *The Mexican claim, when condemned, lost its vitality. From that time, as regards the future, it ceased to be a factor to be considered, and was in all respects as if it had never existed.* In this state of things the Railroad Company acquired its title, and that title is indefeasible."

So it is in the case at bar. From the time the lands were restored to the public domain by the Atlantic & Pacific forfeiture Act, they remained "as much 'public land' as any other part of the public domain"; and under the ruling in the Ryan case, the Railroad Company's indemnity territory stood, after the forfeiture Act, entirely unaffected by the past history of the land —it was as if the Atlantic & Pacific grant "had never existed." The true question is: *What was the status of the land at the date of selection?* If then public land, otherwise free for selection, it is immaterial what past claims to it may have at some time existed. In other words, if public land, within the Company's indemnity territory, at the date of indemnity selection, it is absolutely immaterial whether the title to such land had formerly been claimed under a Mexican Grant there-

after adjudged invalid (as in the Ryan case), or under a grant from the United States to the Atlantic & Pacific Railroad Company thereafter declared forfeited (as in the case at bar).

The Ryan decision was followed in the following, among many other, Supreme Court cases: **Barney vs. Winona, 117 U. S. 228; Wisconsin Central vs. Price County, 133 U. S. 496; United States vs. Missouri, etc., Railroad, 141 U. S. 358; Hewitt vs. Schulz, 180 U. S. 139; S. P. R. R. Co. vs. Bell, 183 U. S. 675.**

These decisions firmly establish the rule, first announced in the Ryan case, that *the right of indemnity selection depends on the status of the land as public land at the date of selection,* irrespective of its status at some former time.

(b). Since the decision by the Supreme Court in the Ryan case, the Interior Department has uniformly followed its ruling.

In **Bright vs. Nor. Pac. R. R. Co., 6 L. D. 615,** the Secretary of Interior said:

> "It has been repeatedly held by the courts and this department that the Company can acquire no right to indemnity lands prior to selection thereof, and that the status of such lands at the date of application to select must govern the determination of conflicting claims. Prest vs. Nor. Pac. R. R. Co., 2 L. D. 506; St. Paul M. & M. Ry. Co. vs. Bond, 3 L. D. 50; S. P. R. R. Co. vs. Reed, 4 L. D. 256; Brady vs. S. P. R. R. Co., 5 L. D. 658; Ryan vs. Railroad Co., 99 U. S. 382."

The foregoing decision is followed, and the same

rule announced, in **Missouri K. & T. Ry. Co. vs. Beal, 10 L. D. 504; Hensley vs. Missouri K. & T. Ry. Co., 12 L. D. 19; Hastings & Dakota Ry. Co. vs. St. Paul Ry. Co., 13 L. D. 535; Nor. Pac. R. R. Co. vs. Lumis, 21 L. D. 395; South & North Ala. R. R. Co. vs. Hull, 22 L. D. 273; S. P. R. R. Co. vs. McKinley, 22 L. D. 493.**

In the case of **Allers vs. Nor. Pac. R. R. Co., 9 L. D. 452** (decided in 1389), Secretary Noble held that

> "A tract is not excluded from indemnity selection by reason of its being within the primary limits of another grant, if it is in fact vacant public land at date of selection, and otherwise subject to such appropriation."

In **Nor. Pac. R. R. Co. vs. Halverson, 10 L. D. 15** (in 1890), the same Secretary held that

> "The right to select indemnity land is not defeated by the fact that the land is within the primary limits of another grant, if the land is excepted from such grant and vacant public land at date of selection."

In **Nor. Pac. R. R. Co. vs. Moling, 11 L. D. 138** (1890) the same Secretary held that

> "The right to select a tract as indemnity under a railroad grant is not defeated by the mere fact that the selection is within the primary limits of another grant, if the tract is vacant public land at date of selection."

In **Nor. Pac. R. R. Co. vs. Bass, 13 L. D. 535** (1891), Acting Secretary Chandler held that

> "The mere fact that the tract is within the geographical limits of another grant will not defeat the

right to select the same as indemnity, if it is otherwise subject to selection."

Secretary of Interior Smith, in **St. Paul M. & M. Ry. Co. vs. Munz, 17 L. D. 288** (1893), held that

"A tract of land within the primary limits of one grant and the indemnity limits of another, may be selected by the latter, on proper basis, if excepted from the grant to the former, and free from other claims at date of selection."

In re **St. Paul M. & M. Ry. Co., 25 L. D. 545,** the Secretary of Interior held that

"The occupancy of town lots under a scrip location should not be held such an adverse claim, or right, as will defeat the right of selection under the Act of August 5, 1892, where at the date of such selection the scrip has been withdrawn, and the occupants and purchasers thereunder disclaim any interest adverse to the Company."

Again, in **Or. & Cal'a R. R. Co. vs. Crewdson, 29 L. D. 440,** the Secretary of Interior held as follows:

"Odd-numbered sections within the indemnity limits of the grant made by the Act of July 25, 1866, and also within the overlap of that portion of the prior grant for the Northern Pacific road via the valley of the Columbia River, which was never definitely located or constructed and the grant for which was forfeited by the Act of September 29, 1890, are subject to indemnity selection under said grant of 1866, so far as any claim under the Northern Pacific grant is concerned."

In **Hensley vs. Mo. Kansas & Tex. Ry. Co., 12 L. D. 19,** the Secretary held that

> "Land excepted from withdrawal by the existence of a pre-emption claim, is not excluded thereby from subsequent selection, if at the date thereof such claim has expired or is abandoned."

In **New Orleans & Pac. Ry. Co. vs. Perkins, 16 L. D. 65,** the Secretary of Interior held that

> "The outstanding certification of lands to the State under the grant of June 3, 1856, did not prevent re-investment of title in the United States by the forfeiting Act of July 14, 1870, and is therefore no bar to the selection of such lands as indemnity after the passage of said Act."

Again, in **Scanlin vs. New Orleans & Pac. Ry. Co., 27 L. D. 274,** the Secretary of Interior held that

> "The Act of July 14, 1870, forfeiting the grant of June 3, 1856, in aid of the New Orleans and Opelousas road, operated to restore lands embraced in said grant and certified thereunder, to the public domain, without a formal act of conveyance on the part of the State; so, after such statutory restoration, the right acquired by said certification was no bar to the selection of indemnity lands by the New Orleans & Pacific."

Under the settled rule, therefore, of the United States Supreme Court and the Interior Department, the Southern Pacific Railroad Company's indemnity selection of the lands in this suit were lawfully made, and are valid.

II.

IT HAS NOT BEEN HELD IN ANY OF THE DECISIONS INTRODUCED OR RELIED ON IN BEHALF OF THE UNITED STATES, THAT THE RAILROAD COMPANY IS NOT ENTITLED TO SELECT AS INDEMNITY, LANDS WITHIN LIMITS OF THE FORFEITED ATLANTIC & PACIFIC GRANT.

There were introduced in evidence on behalf of the United States, against our objection, copies of parts of the records on file in the office of the Clerk of this Court, of the cases familiarly known as No. 67-68-69, No. 184, and No. 600, wherein the United States was plaintiff and the Southern Pacific Railroad Company (with others) was defendant; the final decisions of which cases are reported in (a) 146 U. S. 570, (b) 146 U. S. 615, (c) 168 U. S. 1, and (d) 183 U. S. 519.

Those decisions do not, nor does any one of them, hold that the Southern Pacific Railroad Company is not entitled to select land within over-lap of the forfeited Atlantic & Pacific grant upon indemnity limits of its Branch-line grant.

(a) In the **146 U. S. 570** case the lands were all in *primary limits* common to the Atlantic & Pacific and Southern Pacific Branch-line grants (146 U. S. 592); hence there was not, and could not have been, any decision in that case as to indemnity rights of the Southern Pacific. After holding that the Atlantic & Pacific maps were sufficient, as maps of definite location, to attach its land-grant, the Court applied the rule of title with priority of grant—a familiar rule, settled and established long before.

(b) Nor could there have been any decision as to Southern Pacific indemnity rights in the **146 U. S. 615** case; for the lands of that case were all in *primary limits* of the Southern Pacific grant. (146 U. S. 618.)

(c) The decision in **168 U. S. 1,** after stating what was decided in the 146 U. S. cases, and holding that all questions before the Court (in 168 U. S. case) were rendered *res judicata* by those former decisions (146 U. S.), decided "here as there" (168 U. S. 62, 2d par.), without discussing or considering indemnity rights of the defendant Railroad Company.

The case decided in 168 U. S. 1 did, it is true, embrace certain lands claimed by the defendant Railroad Company under the indemnity provisions of its Branch-line grant; from which fact it is contended that the said decision is conclusive here as a final determination that the Southern Pacific Railroad Company is not entitled to its Branch-line indemnity lands lying within limits of the forfeited Atlantic & Pacific grant—notwithstanding the lands in this suit were not involved in the 168 U. S. case.

A decision in the 168 U. S. case against the Defendant Railroad Company's right to select lands of its Branch-line indemnity limits, after forfeiture of the over-lapping Atlantic & Pacific grant, would have reversed the ruling in the Ryan case, and the long list of decisions by the Supreme Court and Interior Department approving and following that decision; and yet the Ryan decision is not, nor are any of the decisions which approve or follow it, expressly overruled, or mentioned

at all, in the 168 U. S. decision. As was said in **Holmes vs. Or. & Cal'a R. R. Co., 7 Sawy. 399:**

> "It cannot be supposed that it was the intention to overrule long established principles without even mentioning the cases in which they were elaborately discussed and established."

(d). The case in **183 U. S. 519** (like the case in 168 U. S. 1) included lands claimed by the Southern Pacific Railroad Company under the indemnity provisions of its Branch-line grant. The decision in that case (183 U. S.), after adjudging the United States and Southern Pacific to be equal undivided owners of all lands in suit common to primary limits of the Atlantic & Pacific and Southern Pacific Main-line grants, *ordered the bill of complaint dismissed as to all other lands*—the dismissal order including all lands in suit claimed by the Southern Pacific under the indemnity provisions of its Branch-line grant.

The familiar rule that, in chancery practice, *dismissal of complainant's bill is the equivalent of judgment for defendant on merits,* is thus stated in **Freeman on Judgments, (4th Ed.), Vol. 1, Sec. 270:**

> **"Dismissal of Bill in Equity:** The dismissal of a bill in chancery stands nearly on the same footing as a judgment at law, and will be presumed to be a final and conclusive adjudication on the merits, whether they were or were not heard and determined, unless the contrary is apparent on the face of the pleadings, or in the decree of the court."

As the defendants, in the 183 case, prayed to go hence, the dismissal order is equivalent to judgment for the

defendants; and so it may be said that in so far as (if at all) the decision in 168 U. S. 1 decided against the Southern Pacific's indemnity right to forfeited Atlantic & Pacific lands, the 168 decision is reversed by the (later) 183 U. S. decision.

It is true that, in the 183 U. S. case, the bill was dismissed as to indemnity lands "without prejudice to any future suit or action"; but it must be assumed that the Supreme Court did not mean to grant permission to rebring the same suit—hence, as this is the same suit (as to the lands of this suit) brought again, the decision there is the decision here.

It is respectfully asked that the decree appealed from be reversed.

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